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No. 96-1272

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LEONARD R. KAHN,

Petitioner,

v.

EMERSON ELECTRIC COMPANY, HAZELTINE CORPORATION AND MOTOROLA, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONER

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13 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

QUESTION 1: ANTITRUST-PATENT BOUNDARY ISSUE TREATS RESTRAINT OF COMPETITION BASED ON PATENTS 1

QUESTION 2: THE JURY WAS TASKED TO DECIDE PURE ISSUES OF LAW 3

QUESTION 3: SUPERVISORY POWER SHOULD BE INVOKED TO REQUIRE COMPLIANCE WITH LOCAL RULES 4

PETITIONER'S APPEAL SUFFERED FROM THREE TYPES OF "RATIONING" 7

HISTORY OF AM STEREO 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Related Case:

Kahn v. General Motors,
889 F.2d, 1078, 12 USPQ2d 1997 (Fed. Cir. 1989)
77 F.3d 457, 38 USPQ2d 1063 (Fed. Cir. 1996) . . 2

Miscellaneous:

Baker, Rationing Justice on Appeal, the Problems of the U.S. Courts of Appeals, Justice Research Institute, West. St. Paul, 1994 7

Coffin, On Appeal: Courts, Lawyering and Judging, W.W. Norton & Company, N.Y. 1994 9

Markey, The First Two Thousand Days, Report of the U.S. Court of Appeals for the Federal Circuit BNA's Patent, Trademark & Copyright Journal, Vol. 38, pg. 179 (1989) 6

Rich, My Favorite Things, IDEA, Vol. 35-No. 1, 1994, Franklin Pierce Law Center 5, 6

INTRODUCTION

The Petitioner recognizes that it is easy to fall into the "fatal trap" of arguing irrelevant statements of fact. But, as Judge Spatt stated, A966 this case is "made out essentially by documents." Actually, this appeal is even more document intensive as the Petitioner, in an attempt to avoid a retrial, eschewed factual based arguments and based this appeal on the legal meaning of a few key documents. This now permits the Petitioner to restrict this Reply to relevant matters fully supported by the actual words of documents in record.

QUESTION 1 Antitrust-Patent Boundary Issue Treats Restraint of Competition Based on Patents

This Appeal is based upon the unequivocal wording of the 1992 Contract, A2351. Indeed the first two sections after the "boiler-plate" recitals pretty much makes the case:

"3 Mutual Promises

> ¶3.1 The First Party [Motorola] agrees...to deliver a ... check in the amount of Three Hundred Fifty Thousand ($350,000) Dollars ... to Hazeltine Corporation.
>
> ¶3.2 The Second Party [Hazeltine, Emerson Electric and ESCO Electronics]...will not bring...aid, assist or fund Kahn,...or any other third party in conducting, anywhere in the world, any matter, proceeding, dispute or litigation involving or relating to [infringement by Motorola's AM stereo products..]

Nothing could be clearer, Motorola paid off Hazeltine to destroy the last vestige of AM Stereo system competition by taking away Kahn's economic muscle, thus blocking his

ability to compete. The only real muscle he had was the "right to exclude others" power of patents, a power that Hazeltine had been using prior to 1992 to halt the use of Kahn's Patents to spread the use of Motorola's system.[1] But the 1992 agreement never to sue infringers destroyed Kahn's patents. It is analogous to posting a sign on your lawn; **"TRESPASSERS WILL NOT BE PROSECUTED."**

Finally Hazeltine, true to its 1992 promise in ¶3.2, halted all support of Kahn in the Kahn v. General Motors suit, thus helping to destroy its main remaining domestic and foreign rights it still was obliged to exclusively enforce worldwide. Motorola had thus completed its destruction of the last vestige of competition.

Even if the 1992 Contract formally signed by top officials of all three Defendants did not speak most eloquently for itself, we have the contemporaneous letter from Hazeltine's General Counsel to Motorola (B16 to Petition) proving that ¶ 3.2 also halted Hazeltine's assistance to Kahn in enforcing his 18 U.S. AM Stereo Patents and their 200 foreign counterparts patents against Motorola or General Motors and other Motorola licensees. Indeed, none of Hazeltine's employees could help even at night.

Therefore, even if there wasn't clear requirements for Hazeltine to assist Kahn in the General Motors suit so as to avoid invalidating the U.S. Patent upon these important

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[1]Hazeltine's 1991 Worldwide Licensing Policy was clear: "Licenses would not be available from Hazeltine for any receivers which are not capable of receiving Kahn/Hazeltine system broadcasts, such as those which are capable of receiving only broadcasts that use Motorola's C-Quam AM stereo system." A2391

foreign counterparts depended, Motorola clearly had no right to interfere with Kahn's personal and professional relationships with Hazeltine's engineers and attorneys, especially when such interference was manifestly exercised to maintain Motorola's monopoly.

In Respondents' antitrust section arguing that there is no antitrust issue that merits review, they failed to provide a single citation treating this serious question re the boundary between antitrust and patent law whereat, patents are somehow to be excluded from competition. This is a significant issue and if the present decision is permitted to stand such practice will further discourage privately funded research. Thus, if major industrial players controlling mass production facilities can contract to support a monopoly by agreeing never to enforce patents that may interfere with status quo monopolies, individual inventors will face a new and truly impassable barrier to the entry of their inventions.

QUESTION 2 The Jury Was Tasked To Decide Pure Issues Of Law

This is an amazing situation, a lay jury being asked to decide complex questions of law. The Respondents, on Page 3, could only argue that "The district court only submitted to the jury the breach of implied covenant of good faith..." This is clearly inaccurate. Jury Questions 6 to 10 (A2929) cover "Anti-Trust Cause of Action Against the Defendants Emerson Electric Co. and Motorola, Inc. Alleging a Restraint of Trade." Once again, the record speaks for itself and even the most skillful advocates cannot cover up the record, the Jury was asked to decide the fact free antitrust consequences of a formal contract.

The Respondents also argue that the Trial Judge did

his own analysis. But if he did, he certainly did not share that analysis, but merely discussed the jury's reaction and bolstered its decision by Defendants' expert testimony and Defendants' officers testimony that they really didn't mean to harm Kahn and restrain trade. But self-serving testimony should not be permitted to alter the words of a year long secretly negotiated contract signed by senior legal and business officials of these multi-billion dollar firms.[2]

But the Trial Court, on the basis of documents; the 1992 Contract and the negotiated formal letter, B16, absent material questions of fact should have made his own rulings and never submitted the key Antitrust Count to the Jury. **The only factual question that might have been asked of the jury is: Does AM Stereo constitute a separate relevant market?** That issue was never presented (A2326-33), because none of the Economic Experts disagreed that AM Stereo is such a market, in their "rule of reason" analyses and here there is arguably a per se violation.

QUESTION 3 Supervisory Power Should Be Invoked To Require Compliance With Local Rules

The court below not only failed to follow its own rules, even on quorum, it failed to provide even the appearance of justice in this case that was brought in part to rescue a billion dollar industry that provides an important public service.

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[2]Emerson claims that it signed the 1992 Contract as some sort of "accommodation." But the legal impact of the signing is not altered. Moreover, it also formally agreed never use patents to compete against Motorola in Motorola's monopolized field. Thus, hi-tech Emerson agreed never, for all times, to enforce patents in what was then a multi-billion dollar industry. It is difficult to swallow the story that it did this as a mere courtesy.

Respondents' key argument is tersely stated as follows:

> What we do know, as reflected in the June 12 Notice, is that the court had already determined that the appearance of the case on the calendar for August 1 was a mere formality and that 'nothing concerning this case will take place in open court'...(Page 2)

But Federal Circuit practice makes it clear that the panel that was assigned to deliberate and adjudicate the issues had not been selected until July. Furthermore, Judge Nies would not have been appointed to the final "Special Panel" until later as the panel assigned in July had to first make the decision that it needed her expertise to decide the case.

To call the decision making process that took place on August 1st "a mere formality" and that Judge Nies somehow was involved in this cases determination because nothing would happen in "open court" beclouds the overall process by which submission by brief cases are decided. Furthermore, it ignores the Court's own Judgment wherein it is stated that:

> "Senior Judge Nies took no part in the disposition of this appeal." (Appendix B1)

As Judge Rich of the Federal Circuit, pointed out:

> In a typical month...there is a week of hearing during which a judge sits a minimum of four days, with seven cases assigned per day, four to be argued and three submitted on briefs...so, one month may give a judge responsibility for voting on as many as 28 appeals...After hearing its cases, a panel retires to a conference room where the judges exchange views on

> how each case should be decided, if possible, whether an opinion should be written...and who should write it. These are deemed 'straw votes' and not binding. They may take from 10 to 30 minutes. That is usually the extent of the face-to-face panel conferring.[3] at Page 8

Note that all of the cases, including the ones taken on briefs, are first considered by the deciding panel, (as distinguished from its individual judges), at that conference. Also note the similarity with a jury first directed to deliberate at the end of a trial. As the Respondents on page 9 agree "..the Federal Circuit's practice might be more clearly reflected if the case had been removed from the August l calendar when it was in fact taken under submission." It is petitioner's position that if the panel had followed the letter, and admittedly, the spirit of the law, they would have done just that and hopefully with a third member or a fresh panel would have reached the correct decision, obviating this Petition. But they didn't and for the petitioner's 30 year career to be terminated in this fashion should not be permitted. And, importantly, a clear statement by this Court calling for strict compliance with local rules is of significance to all future parties who feel strongly enough to seek appellate review.

In truth, if any step in the procedure can be identified as a mere formality, it was the June 12th action wherein another group of judges made the decision to deny oral argument. Indeed, when the Appellant is acting pro se it is almost a

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[3]Rich, My Favorite Things, IDEA, Vol. 35-No. 1, 1994 Franklin Pierce Law Center. Also see Chief Judge Markey The First Two Thousand Days. Report of the U.S. Court of Appeals for the Federal Circuit, BNA's Patent, Trademark & Copyright Journal, Vol. 38, pg. 179 (1989)

certainty that oral hearing will be denied. Thus, pro se appellants can expect the form letter that the Respondents reproduced as Addendum B. Please note the second sentence of that letter states:

> this case **will be submitted** to a panel of judges of the court on August 1, 1996.(emphasis added)

Note it did not say it would be submitted on/or before August 1, 1996, it said it will be submitted on August 1st. The result is not of minor consequence. The loss of a third judge in the decision making process is similar to excusing, for no cause, a third of the jury just prior to deliberations.

That the Federal Circuit is not unique in its handling of submissions, Judge Coffin provides a very readable and interesting chapter "A Day in Court" in his detailed discussion of practice at the First Circuit. Footnote 6, infra

Petitioner's Appeal Suffered from Three Types of "Rationing"

In Professor Baker's careful study of appellate court proceedings,[4] he details attempts at increasing efficiency. But he prefaces his study with a quote from Learned Hand:

> If we are to keep our democracy, there must be one commandment: Thou shall not ration justice.

Nevertheless, this single case suffers from three separate steps of rationing justice.

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[4]Baker, Rationing Justice on Appeal, the Problems of the U.S. Courts of Appeals, Justice Research Institute, West, St. Paul, 1994

1. Oral argument was denied even though the appeal involved complex issues of law;

2. The case was submitted to and determined by a two judge panel against clear unambiguous local rules on panels and quorum;[5]

3. The court never issued a single word of explanation why it affirmed the lower court.

Each one of these practices is found to be reprehensible by such scholars as Professor Baker, and combined they certainly transgressed Judge Hand's Commandment.

Of the three "sins," Professor Baker finds the gravest to be the last one. In one of his rare displays of vehement, unequivocal flat-footed thou shall not remarks, he opined that deciding appeals without issuing a written opinion to the parties "deserves to be formally abolished, rather than just being allowed to fall into disuse." (id at 125)

As to the first sin Professor Baker is not nearly as concerned. Indeed, he argues that trivial cases that do not require further elaboration beyond the briefs can and should be denied oral argument, if the court issues an opinion.

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[5]Professor Baker discusses the small efficiency gain of "dyad" over "triad" panels especially since "relatively small proportion of judge time [is] spent on preparing, hearing, and deciding 'easy' appeals." (pg. 173) But not included is the arithmetic showing how effective three judge, rather than two judge panels, are in keeping unusual positions from totally controlling a panel. Assuming a pool of sixteen judges, the probability of getting two non-conformist judges on a two judge panel is 2.5%, whereas the probability of getting three such judges on a three judge panel is only 0.1786%.

Without an opinion and without an oral no appellant can be expected to believe in the entire process. But, in the instant case, given its complexity, surely the appeal court needed oral argument, as Judge Coffin has argued.[6]

The Respondents argue that this due process issue is totally insubstantial and supports this argument by suggesting that there is nothing "fundamentally unfair" about the Federal Circuit's conduct. However, the cumulative effect of all three rationing steps is manifestly unfair.

In any case, the Federal Circuit Rules are clear and should not be bent to terminate these years of litigation without a single word of explanation. The Petitioner does not wish to engage in the arcane questions of due process and "governmental regularity" but the bottom line should be that court's should religiously follow their own rules so that when individuals enter the appellate arena they know that pure accidents will not factor into the destruction of their case.

History of AM Stereo

As to the defendants' "rewrite" of history and status of AM Stereo on page 5, it would take more than 10 pages just to answer. There is one point where the parties concur: "the public simply does not care about AM stereo radio." Page 7 All this proves is the obvious. A system so defective as to cause at least the judge and one juror to find the sound so

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[6]Coffin, On Appeal: Courts, Lawyering and Judging, W.W. Norton & Company, N.Y. 1994. Judge Coffin argues that oral argument is an efficient way to increase the judges' understanding and, critically, eliminate misunderstandings. He uses the term "conversations with the court" to make the procedure's importance crystal clear. id 132-135.

clearly offensive, surely cannot be forced upon the public. The basic battle here is between systems,[7] one that broadcasters know is viable and the other which isn't. The public has spent literally billions of dollars on AM Stereo Radio. (Twenty five million car radios, average price of $800, with no trade in for the original radio.) AM stations have spent millions in equipment. Thus, there is public interest in this matter at least to the extent that this appeal should strictly follow the rules.

CONCLUSION

Petitioner respectfully requests this Honorable Court to remand this appeal to the Federal Circuit for hearing and consideration ab initio by a newly selected three judge panel.

Dated: March 21, 1997

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[7]But the battle plan was not to challenge Motorola's legendary influence of governments, but to use Kahn's patents to obtain injunctive relief. (Hazeltine's 1991 Policy, footnote 1.) Motorola's system's fatal flaw was that it did not work without Kahn's invention. And Hazeltine's trump card was to refuse to license Motorola radios. This was the checkmate situation in 1991, when Motorola initiated its secret negotiations to destroy all of Kahn's patents and end competition. That the public said "no" because of other Motorola stereo defects, is not an antitrust defense. Signing the 1992 contract and mailing Hazeltine's surrender letters to Japan and Britain (A2386-90), agreeing not to use Kahn's patents to interfere with Motorola's monopolization, completed the offense. What damage this did to the public after 1992 is lamentable, but it is IRRELEVANT to this appeal which is based on the 1992 contract that caused all "Second Party" billion dollar firms to restrain competition with Motorola, forever.